National Labor Relations Board Weekly Summary of

NLRB Cases

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Brighton Retail, Inc. (28-CA-20323; 354 NLRB No. 62) Scottsdale, AZ, July 31, 2009. The Board adopted the administrative law judge's findings on remand. Previously, the Board remanded to the judge for reconsideration his finding that the Respondent violated Section 8(a)(1) of the Act by discharging two employees and issuing a written warning to another employee. The Board held in abeyance the judge's additional findings that the Respondent further violated the same Section by promulgating and maintaining rules limiting discussion concerning terms and conditions of employment among employees, and by interrogating two employees about their protected concerted activities. [HTML] [PDF]

On remand, the judge found that the Respondent sustained its burden of showing that the employees would have been discharged and would have been issued a written warning even in the absence of their protected concerted activities. The Board adopted the judge's dismissal of the Section 8(a)(1) allegations concerning the Respondent's discipline of its employees, and the judge's findings of the Section 8(a)(1) violations concerning the Respondent's promulgation of unlawful rules and interrogation of two employees.

The Board made certain qualifications. It noted Section 8(a)(1) violations adopted in the absence of exceptions concerning an overly broad no-solicitation/no-distribution rule and a rule prohibiting employees from discussing salaries. It noted its agreement with the judge that the Respondent's discipline of the employees was based on a reasonable belief that they had engaged in unprotected hostile and disruptive behavior towards coworkers, in contravention of the Respondent's written teamwork policies. It found that Section 10(b) did not bar the interrogation finding concerning the Respondent asking an employee if she was aware of a lawsuit and asking another employee if she was planning to sue the Respondent. It further noted that the Respondent by asking these questions attempted to elicit information about whether the two employees being interrogated or any other employees planned to file a lawsuit as a means of protesting about their working conditions. It therefore found the interrogation violation in agreement with the judge but found it unnecessary to pass on whether the Respondent also unlawfully interrogated employees about a possible dinner celebration because a supervisor was in trouble. Member Schaumber noted that in the absence of a majority to reverse the judge's finding of the interrogation violation, he, for institutional reasons, joined his colleague in adopting this violation.

(Chairman Liebman and Member Schaumber participated.)

Adm. Law Judge Jay R. Pollack issued his supplemental decision on June 19, 2008.

Chenega Integrated Systems, LLC and Chenega Security Protective Services, LLC (5-RC-16299; 354 NLRB No. 56) Alexandria, VA, July 29, 2009. The Board adopted the Regional Director's findings and certified International Union, Security, Police and Fire Professionals of America (SPFPA) as the exclusive collective-bargaining representative for the Employers' security

officers performing security services at the Arlington Hall Readiness Center in Arlington, VA. The mail ballot election, held between April 24 and May 22, 2009, resulted in a tally of ballots showing 9 for and 6 against the Union, with no challenged ballots. [HTML] [PDF]

In adopting the Regional Director's findings, Member Schaumber noted that, although this case was reflective of the procedural problems and reliability issues associated with mail ballot elections, the Employers specifically stipulated to conducting a mail ballot election here. Member Schaumber indicated that he would continue to limit the use of mail ballot elections to the rare circumstances where a traditional Board-conducted secret ballot election would make it difficult for eligible employees to vote or where a manual election, though possible, was impractical or not easily done.

(Chairman Liebman and Member Schaumber participated.)

Fola Coal Co. LLC d/b/a Powellton Coal Co. (9-CA-44608, 44650; 354 NLRB No. 60) Bickmore, WV, July 31, 2009. The Board adopted the administrative law judge's decision and found that the Respondent violated Section 8(a)(1) of the Act by informing discriminatee Heath Coleman that he was not allowed to pass out union literature on company property and by promulgating an unlawfully broad rule that prohibited employees from engaging in conversations about the Union, from engaging in solicitation, and from engaging in distribution during paid time. The Board also adopted the judge's finding that the Respondent violated Section 8(a)(3) by issuing Coleman a verbal warning for "union talk on pay time," but found it unnecessary to pass on his additional finding that the verbal warning also violated Section (a)(4) because the remedy for that violation would be essentially the same as the remedy for the Section 8(a)(3) violation. Finally, the Board adopted the judge's findings that the Respondent violated Section 8(a)(3) by issuing Coleman a verbal warning and a written warning for constructing inadequate terms. [HTML] [PDF]

(Chairman Liebman and Member Schaumber participated.)

Charges filed by Mine Workers; complaint alleged violations of Section 8(a)(1), (3) and (4). Hearing at Charleston, Feb. 10-11, 2009. Adm. Law Judge George Carson II issued his decision April 16, 2009.

Texas Dental Assn. (16-CA-25349, et al.; 354 NLRB No. 57) Austin, TX, July 29, 2009. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by discharging supervisor Barbara Jean Lockerman for her refusal to engage in an unfair labor practice and employee Nathan Clark for engaging in protected concerted activities. [HTML] [PDF]

Lockerman attended a meeting of employees in which the employees, using aliases, signed a petition to the board of directors alleging management deficiencies and unfairness at the Respondent's headquarters. The Board found that the employees' activities were protected and concerted under the Act. Lockerman did not disclose her attendance or the employees' activities to the Respondent, despite a subsequent instruction by the executive director to employees and supervisors that they must reveal their participation in recent "anonymous communications" as a condition of employment. The Board agreed with the judge that Lockerman's discharge was unlawful, because, even though supervisors are not covered by the protections of the Act, the termination of a supervisor violates Section 8(a)(1) in limited circumstances, including when it is based on a refusal to commit an unfair labor practice. In such cases, the Board has found that prohibiting the supervisor's discharge is necessary to vindicate employee rights. The Board found that Lockerman had a reasonable belief, based on statements by the Respondent's managers and corroborated by its conduct, that the Respondent sought to identify and terminate employees involved in the petition. The Board concluded that the Respondent discharged Lockerman for failing to cooperate with that unlawful effort.

The Board also agreed with the judge that the Respondent discharged Clark for anonymously emailing the petition to the board of directors. Although the Respondent asserted that it discharged him because he disobeyed its direct order to report participation in such communications, the Board found that employees are not required to reveal their protected concerted activities and that Clark's failure to do so was not a lawful basis for discharging him. The Board further rejected the Respondent's contention that Clark had violated its telecommunications policy, finding that the Respondent permitted employees to use its email system for personal emails and that the emailed petition was not encompassed by the categories of communications prohibited by the Respondent's policy.

(Chairman Liebman and Member Schaumber participated.)

Charges filed by individuals; complaint alleged violations of Section 8(a)(1). Hearing at Austin, Feb. 11-12, 2008. Adm. Law Judge George Carson II issued his decision April 10, 2008.

Tinney Rebar Services, Inc. (6-CA-36203; 354 NLRB No. 61) Oakdale, PA, July 31, 2009. The Board in a 2-O decision adopted the recommended Order of the administrative law judge and dismissed the complaint. The Board affirmed the judge's finding that the Respondent did not violate Section 8(a)(3) by terminating employee John Bascovsky immediately after he informed his supervisor that he was going to quit and pursue employment through the Union. In finding that the Respondent met its burden under Wright Line, 251 NLRB 1083 (1980), to show that it would have terminated Bascovsky even in the absence of his union activity, the Board relied solely on the judge's finding that the Respondent established that it had a business policy of immediately terminating any employee who gave notice of intent to resign, and did not rely on the judge's speculation regarding the Respondent's purposes for the policy or on his discussion

of Bascovsky's at-will employment status. In a personal footnote, Member Schaumber assumed arguendo that the General Counsel satisfied his burden of showing that the Respondent's termination of Bascovsky was motivated by anti-union animus. He stated, however, that the reasons relied on by the General Counsel to establish the Respondent's anti-union animus illustrated his position that the Board's use of the term "anti-union animus" is overly broad. To eliminate confusion, Member Schaumber would prefer that the Board adopt the term "Section 7 animus" to refer to unlawful motivation arising from hostility toward protected activities.

[HTML] [PDF]

(Chairman Liebman and Member Schaumber participated.)

Charge filed by Ironworkers Local 3; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Pittsburgh on Jan. 27, 2009. Adm. Law Judge Earl E. Shamwell Jr. issued his decision May 6, 2009.

United Plasterers, LLC and Dun-Rite Drywall and Finish Systems, Inc. (7-CA-50844, 50845; 354 NLRB No. 55) Shelby Township, MI, July 29, 2009. In a supplemental decision, the Board granted in part and denied in part the General Counsel's motion for partial default judgment, alleging that Respondents failed to file an adequate answer to certain allegations in a compliance specification issued after the Sixth Circuit enforced the Board's Decision and Order reported at 353 NLRB No. 44 (2008). The Board considered Respondents' initial and amended responses to the compliance specification, as well as their response to the Board's Notice to Show Cause, in the light most favorable to Respondents. The Board found that Respondent United sufficiently stated the basis for its disagreement with the specification's gross backpay formula and calculations, and provided an alternative formula, when it asserted that Charging Party Laurie Skinner would have worked only 2 of the 4 weeks in Dec. 2007 and Jan. 2008, and that Skinner's hours should be based on an average work week of 40 hours rather than the number of hours set forth in the specification. Accordingly, the Board denied default judgment as to those allegations pertaining to the number of hours and weeks Skinner would have worked for Respondent United after her unlawful termination. Respondent United also contested the effective dates of Skinner's backpay period, but the General Counsel did not seek default judgment as to that issue, or as to Skinner's interim earnings and expenses. [HTML] [PDF]

The Board granted the General Counsel's motion for partial default judgment against Respondent Dun-Rite. Respondent Dun-Rite conceded the accuracy of the compliance specification except for the allegation that Charging Party Susan Grievo's backpay continued to accrue (Dun-Rite asserted that Grievo would have been laid off on or before July 15, 2008 even in the absence of any unfair labor practices). The General Counsel did not seek default judgment as to the effective dates of Grievo's backpay period, or as to Grievo's interim earnings and expenses.

The Board directed a hearing as to the effective dates of the backpay periods of Skinner and Grievo, the number of hours and weeks that Skinner would have worked for Respondent United after its unlawful termination of her, and the interim earnings and expenses of Skinner and Grievo.

(Chairman Liebman and Member Schaumber participated.)

United States Postal Service (28-CA-21792, et al.; 354 NLRB No. 58) Albuquerque, NM, July 30, 2009. The only issues in this case involved the remedy for the Respondent's Section 8(a)(5) of the Act delay in providing requested grievance-related information. The administrative law judge recommended a broad order, but did not grant the General Counsel's request to extend it to other unions and to order a district-wide posting of the notice. The Board substituted a narrow order for the judge's recommended broad order and agreed with the judge's recommendation to not extend the order beyond the parties and locations involved. [HTML]
[PDF]

(Chairman Liebman and Member Schaumber participated.)

Charges filed by Postal Workers; complaint alleged violation of Section 8(a)(5). Hearing at Albuquerque, June 17-19, 2008. Adm. Law Judge John J. McCarrick issued is decision Nov. 25, 2008.

DECISIONS OF ADMINISTRATIVE LAW JUDGES

Howard Industries Inc., Transformer Division (Electrical Workers Local 1317) Laurel, MS, July 28, 2009, 15-CA-18637, 18772, JD(ATL)-16-09, Judge George Carson II

The Camelot Sample Group, Inc. (Steelworkers Local 4-107) Brooklyn, NY, July 28, 2009, 29-CA-29473, JD(NY)-30-09, Judge Steven Davis

Stevens Creek Chrysler Jeep Dodge, Inc. (Machinist Automotive Local 1101, Machinist District Lodge 190) Fremont, CA, July 29, 2009, 20-CA-33367, et al., JD(SF)-25-09, Judge Jay R. Pollack

Bashas' Inc. d/b/a Bashas' Foods City and A.J.'s Fine Foods (Food & Commercial Workers Local 99) Chandler, AZ, July 30, 2009, 28-CA-22155, et al., JD(SF)-26-09, Judge John J. McCarrick

RWJ Corp. (Road Sprinklers Fitters Local 669) Sebring, OH, July 31, 2009, 8-CA-37361, et al., 8-RC-16909, JD-34-09, Judge David I. Goldman

NO ANSWER TO COMPLIANCE SPECIFICATION

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the compliance specification.)

Liberty Source W, LLC and/or Trafford Distribution Center its alter ego and/or Trafford Distribution Center, Inc., Debtor (Communication Workers Local 601) (6-CA-33661, 33729; 354 NLRB No. 59) Trafford, PA, July 31, 2009. [HTML] [PDF]

UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following case, the Board considered exceptions to Report of Regional Director or Hearing Officer)

SUPPLEMENTAL DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Conn-Selmer, Inc., Elkhart, IN, 25-RD-1505, July 30, 2009 (Chairman Liebman and Member Schaumber)

(In the following case, the Board adopted Report of Regional Director or Hearing Officer in the absence of exceptions)

DECISION AND DIRECTION [that Regional Director open and count ballots]

Metro Fire & Safety, Inc., Spring Valley, CA, 21-RC-21086, July 29, 2009

(In the following cases, the Board granted requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Sleepy's Inc., 34-RC-2317, Bethpage, NY, 34-RC-2317, July 30, 2009 (Chairman Liebman and Member Schaumber) [denying Employer's motion to stay election as moot]

Northrop Grumman Shipbuilding, Inc., Newport News, VA, 5-RC-16292, July 30, 2009 (Chairman Liebman and Member Schaumber) [denying Employer's request to stay election as moot]

Wheeling Island Gaming, Inc., Wheeling, WV, 6-RC-12664, July 30, 2009 (Chairman Liebman and Member Schaumber)

(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Fred Meyer Stores, Inc., 19-RC-15209, July 28, 2009 (Chairman Liebman and Member Schaumber)

Fred Meyer Stores, Inc., 19-RC-15210, July 28, 2009 (Chairman Liebman and Member Schaumber)

Fred Meyer Stores, Inc., 19-RC-15211, July 28, 2009 (Chairman Liebman and Member Schaumber)

Miscellaneous Board Decision and Order

ORDER [affirming Regional Director's administrative dismissal of petition]

Gateway Packaging Co. of Missouri, Kansas City, MO, 17-RM-864, July 28, 2009 (Chairman Liebman and Member Schaumber)
